



SMU | DEDMAN
SCHOOL OF LAW

SMU Law Review

Volume 18 | Issue 3

Article 3

1964

Practice and Procedure in Oil and Gas Hearings in Texas

Joe Greenhill

Robert C. McGinnis

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Joe Greenhill, et al., *Practice and Procedure in Oil and Gas Hearings in Texas*, 18 Sw L.J. 406 (1964)
<https://scholar.smu.edu/smulr/vol18/iss3/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

PRACTICE AND PROCEDURE IN OIL AND GAS HEARINGS IN TEXAS

Joe Greenhill and Robert C. McGinnist†*

IF ONE considers that the Railroad Commission of Texas conducts at least 3,200 oil and gas hearings each year as a part of its regulation of more than 237,000 oil and gas wells in over 8,500 fields, it may seem surprising that the Commission has adopted only six written rules governing the practice and procedure for such hearings. It may seem even more surprising that until 1961 the Commission had no written rules pertaining to oil and gas hearings other than provisions relating to motions for rehearing.¹ In 1961, pursuant to a legislative mandate requiring each State agency to adopt rules prescribing its formal and informal procedures including rules of practice,² the Commission promulgated the following:

Rules of Procedure and Practice in Connection with the Conservation of Oil and Gas and the Prevention of Waste Thereof before the Railroad Commission of Texas:

1. Notices of hearings shall be in accordance with the provisions of article 6036a. . . .³

2. The hearings shall be conducted by the Chief or Assistant Chief Engineer of the Oil and Gas Division or an Examiner thereof or by any other employee of the Commission designated to hold such hearings; provided however that one or more of the Commissioners may hold such hearings or otherwise participate therein.

3. Testimony shall be made under oath.

4. The proceedings at all such hearings shall be recorded by a reporter designated by the Commission and a transcript of the same

* Associate Justice, Supreme Court of Texas, 1957- ; B.A., B.B.A., LL.B., The University of Texas; Chairman, Mineral Law Section, State Bar of Texas, 1956-1957.

† Attorney at Law, Austin, Texas; B.A., The University of Texas; LL.B., Yale University; Chairman, Administrative Law Committee, State Bar of Texas, 1960-1961. The authors are indebted to Fred Young, Legal Counsel, Oil & Gas Division, Railroad Commission of Texas, for his advice and assistance and to William P. Weir of the Southern Methodist University Law School Class of 1964 for his research and interviews with Commission personnel. This Article is adapted from and supplements a paper presented by Joe Greenhill at the annual meeting of the Mineral Law Section, State Bar of Texas, July 3, 1953.

¹ Special Order No. 20-1185, Tex. R.R. Comm'n Rules & Regs. § 1, at 34 (1940); see also Unnumbered Special Order, March 3, 1941, Tex. R.R. Comm'n Rules & Regs. § 1, at 12 (1941), relating to motions for rehearing and Rule 37 exception orders. See text accompanying and following notes 76-80 *infra*. Hereafter, Commission rules will be cited merely by number; citations to Tex. R.R. Comm'n Rules & Regs. will be omitted.

² Tex. Rev. Civ. Stat. Ann. art. 6252-13 (1961) (1) requires each state agency to file with the Secretary of State a certified copy of all rules adopted by it, (2) directs the Secretary of State to maintain a public register of rules open to public inspection, and (3) provides that rules not filed as directed are void. The application of the statute is limited, by its terms, to rules of practice and procedure.

³ Tex. Rev. Civ. Stat. Ann. art. 6036a (1962); see text accompanying note 21 *infra*.

shall be prepared and filed by such reporter as a part of the Commission's record.

5. In making any ruling or decision, or in promulgating any rule, regulation or order or in making other findings based upon such hearing, the Commission shall consider evidence adduced at such a hearing *and other pertinent facts and information available to the Commission from its own records and files.* (Emphasis added.)

These five rules, together with the provisions relating to motions for rehearing,⁴ constitute all of the Commission's written rules of practice and procedure in oil and gas hearings. From the paucity of the written rules, however, one should not conclude that there are no other established procedures, for custom has crystallized somewhat the procedural form of oil and gas hearings.

This Article is a descriptive rather than a critical analysis of the present practice and procedure of the Railroad Commission in oil and gas hearings. It is designed to indicate those situations in which the standards have become more or less fixed and to suggest in other instances methods which have been used in the absence of established standards. Hopefully, this Article will be of practical benefit to those persons who may be called upon to represent clients before the Railroad Commission.

I. TYPES OF HEARINGS

Oil and gas hearings conducted by the Railroad Commission generally are characterized as either statewide or special hearings. Little similarity exists between the practices and procedures followed in the two types of hearings.

A. *Statewide Hearings*

Statewide hearings are held monthly in Austin primarily to set the State's allowable production. Occasionally, statewide hearings are called to consider, in addition to allowables, specific items of general interest such as, for example, the adoption or revision of statewide rules or regulations. Each month the Commission mails notices to operators whose names appear on a list maintained by the Commission. At their request, other interested persons may be placed on this mailing list. The regular form of the notice for the statewide hearing is extremely general; but if matters other than allowables are to be considered, they usually will appear in the notice. The three Commissioners usually are present at the hearing, with the Chairman presiding. The hearings are conducted like mass meetings; anyone is

⁴ See note 1 *supra* and text accompanying and following notes 76-80 *infra*.

given the opportunity to speak. Sworn testimony rarely is received, and evidence usually is not introduced. Prior to a statewide hearing, the Commission obtains nominations⁵ from purchasers and forecasts of estimated demand from the Bureau of Mines. Thus, at the time of the hearing the Commissioners have most of the basic data with which to determine the monthly allowable production. During the hearing, purchasers are given the opportunity to announce their nominations and to recommend allowables.⁶ Using the data compiled in advance and the information obtained at the hearing, the Commission determines the State's monthly allowable production for the following month and announces that decision at the hearing.

B. *Special Hearings*

Unlike statewide hearings, special hearings are not scheduled regularly but are called either at the request of an operator or on the Commission's own initiative. The subject matter of special hearings may concern specific operators or specific fields, but does not affect directly the entire oil and gas industry. Special hearings are held before a Commission examiner⁷ and frequently involve such matters as the adoption or amendment of field rules, specific exceptions to field or statewide rules, or the determination of productive acreage. The vast majority of oil and gas hearings are special hearings; unless otherwise indicated, the following discussion is limited to such hearings.

II. PLEADINGS AND MOTIONS FOR POSTPONEMENT

The Commission hearing procedure is not governed by formal pleadings. Except in limited instances in which the Commission requires a prescribed form of application,⁸ hearings usually are initiated

⁵ Nominations are statements of the quantity of oil which pipelines and other purchasers expect to buy during the following month.

⁶ At the hearing purchasers may and frequently do announce nominations which differ from those previously filed with the Commission.

⁷ At present there are eight examiners—three are lawyers, two are geologists, and three have engineering backgrounds. In addition, engineers on the Commission's staff occasionally may be assigned to special duty as examiners.

⁸ All hearings pertaining to exceptions to the statewide spacing rule or to individual field spacing rules are known as Rule 37 hearings, which are initiated by the filing of Railroad Commission Form 1 and plat. Applications for new field designation, discovery allowable, multiple completion, pressure maintenance, and salt water disposal are initiated by the filing of Commission forms. Notice of this filing must be furnished by the applicant to interested parties. See Tex. Rev. Civ. Stat. Ann. art. 6036a (1962). If no protest is received by the Commission within ten days and if the Commission is satisfied that the application should be granted, no hearing will be held and the request will be granted by form letter. If a protest is received, the application will be set for hearing and the Commission form will serve as the application for hearing. If the Commission denies the request because it is satisfied that the application is not meritorious, the applicant may request a hearing. In this event, a hearing is set and the Commission form constitutes the application.

by an operator's application letter.⁹ The applicant need not send copies of his application letter to other operators who may be interested in or affected by the application. Indeed, in matters in which a contest is anticipated, the applicant usually does not do so. In oil and gas matters, the Railroad Commission requires no filing fee or deposit for costs since the Commission's oil and gas regulatory activities are financed by a special tax.¹⁰

A. *Form And Scope Of The Application*

The letter of application is similar in only one respect to a plaintiff's original petition in a civil action; *viz.*, it is the instrument by which the action is initiated. There is no prescribed form for an application letter. It need not be sworn to, but must be signed by the applicant or by some person authorized by him to do so.

Although no standards have been established with which to determine the sufficiency or insufficiency of an application, it is nevertheless a very important part of the administrative process. An application need not contain any facts in support of the action sought by the applicant and need not describe the rules which the applicant intends to propose. But since the application serves as the basis for the notice of hearing, it must be broad enough to encompass every action which the applicant desires the Commission to take.¹¹ Thus, if the application does not include a subject which the applicant intends to raise at the hearing, the notice will omit such matter. Generally, the Commission examiners are strict in limiting the scope of the hearing in contested cases to those matters set out in the notice of hearing. Although it is important for the application to be sufficiently broad to support all matters that the applicant wishes to accomplish, it may be tactically advantageous to limit the application's scope so as not to invite a hearing on matters which the applicant prefers not to raise.

Occasionally, an applicant will desire to change the scope of the hearing after the notice has been issued. There is no applicable written rule, but by custom the Commission usually will issue a new notice changing the scope of the hearing to that requested by an applicant.

⁹ However, the Commission may call hearings on its own initiative. Such hearings usually take the form of show cause hearings and generally involve efforts by the Commission to eliminate certain undesirable practices, such as excessive flaring of casinghead gas, the improper disposal of salt water, or noncompliance with existing Commission rules and regulations.

¹⁰ Tex. Rev. Civ. Stat. Ann. art. 6032 (1962). In contrast, applications to the Motor Transportation Division of the Railroad Commission must be accompanied by a nonrefundable filing fee. Tex. Rev. Civ. Stat. Ann. arts. 911a-b (1953).

¹¹ State v. Blue Diamond Oil Corp., 75 S.W.2d 852 (Tex. Civ. App. 1934).

In some circumstances the Commission on its own motion will determine the scope of the hearing independently of that set forth in the letter of application. Generally, this action is taken only if the Commission considers a change in the hearing's scope necessary to effectuate its statutory duty.

After the filing of an application and the issuance of notice, a prospective protestant who desires to raise additional matters at the hearing frequently will request that the scope of a hearing be broadened. In such instances there is no requirement of the Commission that the applicant be notified of the request. Although the Commission may either grant or deny the request, more often it will be treated as a new and independent application for a hearing. If the latter alternative is selected, a separate hearing will be set for the same time as the original hearing. At that time, either on motion of the Commission or of a party, the examiner will determine whether the two hearings should be consolidated. There are no applicable written rules, but the general practice is to consolidate hearings if all participants consent thereto. If consolidation is opposed, the examiner will decide this question after consultation with the Chief Engineer or with one or more of the Commissioners.

B. Responsive Pleadings

Existing Commission practice and procedure do not provide for pleadings in reply to an application. A protestant has nothing comparable to the special exception, the plea in abatement, or the plea to the jurisdiction. There is no practical machinery whereby a protestant can elicit facts not contained in the application which the applicant will rely upon at the hearing. Similarly, a protestant cannot require an applicant to plead in advance precisely the order or the rules that he will request the Commission to promulgate.¹² Moreover, there is no procedure by which a protestant can obtain a ruling in advance of the hearing that certain matters, if proved, would bar the relief sought.

This dearth of pleadings with which to narrow the issues may haunt an applicant also. Because a protestant is not required to file anything, the applicant has no way of knowing prior to the hearing the opposing contentions and the evidence in support thereof that will be presented. Furthermore, an applicant even may not know prior to the hearing whether his application will be contested. Indeed,

¹² However, in rare instances in which an application has had broad general interest, the Commission has requested the applicant to describe in detail the relief he seeks.

during the hearing the protestant may request an order or rule entirely different from that which the applicant proposes.

Since the protestant is not required to disclose his intentions prior to the hearing, the applicant usually will frame his application in general language. Setting forth all facts and contentions in support of the application may serve no purpose other than to educate the opposition in advance of the hearing. By stating his request for relief in general terms, an applicant can appraise the effect of the evidence before deciding upon the precise relief that he will request. But often a matter before the Commission involves a controversy with which all parties are intimately familiar and in which settlement has been attempted unsuccessfully. Also, many of the litigants before the Oil and Gas Division cooperate with each other by exchanging information and arguments in advance of the hearing; thus, they are able to reach an agreement on the relief sought either before or during the hearing. Therefore, despite the absence of explicit provisions governing responsive pleadings, an applicant frequently knows prior to the hearing whether or not his application will be contested and, if so, the basis therefor. Likewise, a protestant often knows in advance of the hearing the relief which the applicant will request and the facts that he will try to establish in support thereof. But in many contested hearings the parties are not apprised of each other's respective legal and factual contentions until after the hearing has begun. In some cases this lack of communication may mean that the issues will not be joined effectively and that some relevant evidence will not be presented.

C. Continuances And Postponements

1. *Postponements by Applicant* No formal rules govern continuances and postponements. As a matter of practice an applicant usually is permitted to withdraw his application at any time without prejudice. Hence, an applicant effectively can postpone most hearings. If an applicant withdraws his application or seeks cancellation of a requested hearing before official notice of the hearing has been issued, no notice of the hearing or of the postponement will be required to be given to other interested parties. If cancellation is requested a reasonable time before the scheduled date for the hearing, the Commission will mail cancellation notices to all persons who received the original hearing notice. But if the request for cancellation is made too late for adequate notice to be mailed in advance of the scheduled hearing date, the Commission will require the applicant to notify all interested parties by telephone or telegraph so that unnecessary

preparation and travel can be avoided. An applicant even may decide to withdraw his application at the commencement of or during the hearing, and his request therefor almost always is honored.¹³ The withdrawal of the application, however, does not prejudice the applicant against a subsequent application for a hearing on the same subject.

In most cases the parties' rights would not seem to be prejudiced by allowing an applicant to withdraw at any time. Presumably an applicant is suffering from an injury for which he seeks a remedy, and the other parties should have no objection to a withdrawal unless they would be injured thereby. However, it is conceivable that a protestant may be injured seriously by an applicant's withdrawal of his application. A protestant may have intended to request a different rule at the hearing; *e.g.*, a rule which would have stopped injury to his own lease. By withdrawing his application, the applicant deprives the protestant of an immediate chance to be heard and thus causes him serious delay until he can obtain a new hearing on his own application. But a protestant who desires affirmative relief can avoid this unfavorable result by filing his own application immediately after receiving notice of the applicant's filing.

2. Postponements by Protestant Requests for postponement or continuance by protestants, unlike those by applicants, are denied more often than they are granted. If granted at all to a protestant, postponement is typically of short duration. Illness or necessary absence of witnesses or of counsel sometimes are considered adequate reasons for the granting of a continuance. Also a forthcoming pressure survey of relevant wells or the imminent completion of a new well that could affect materially the outcome of the hearing may be sufficient grounds for delay. However, requests for continuance based on convenience, conflicting engagements, or inadequate opportunity to prepare often are denied. Requests for postponement made on the day of the hearing seem to be granted less often than requests submitted well in advance of the hearing, because of the obvious inconvenience that usually would result thereby to the other interested parties.¹⁴ In a few instances, the Railroad Commission has taken a middle course when faced with a protestant's request for delay; *i.e.*, it has permitted the applicant to present his evidence and then has recessed the hearing as requested by the protestant. This procedure is eco-

¹³ Withdrawal of an application is similar to nonsuit, which may be taken at any time before the jury has retired. See Tex. R. Civ. P. 164.

¹⁴ This reluctance to grant postponements requested at the hearing is in sharp contrast to the practice of some trial judges who will hear or pass upon a motion for continuance only upon the day the case is set for trial.

nomical for the applicant, and it provides the delay which the protestant seeks. It also accords the protestant an opportunity to study the weaknesses in applicant's evidence before presenting his case. The unfavorable attitude of the Commission toward requests for postponement by protestants apparently has discouraged such requests because few are filed. This result is a desirable one for it protects applicants who may be suffering damage at the hands of protestants (e.g., a protestant enjoying a drainage advantage over the applicant).

III. RIGHT TO BE HEARD

In *Brown v. Humble Oil & Ref. Co.*, the Supreme Court stated: "[W]e hold that since the Legislature has bestowed the power of administering the oil and gas business of this State on the Railroad Commission, every person has the right to apply to that tribunal for relief as a matter of right, and not as a matter of grace."¹⁵ At one time the Commission as a routine matter granted a hearing on every application. However, in recent years the Commission has exercised discretion in determining whether or not to hear an application. The vast majority of applications filed still are set for hearing, but an increasing number are refused. Possible reasons for refusing to hold hearings on applications are (1) that the subject matter of the requested hearing is beyond the jurisdiction of the Commission, (2) that the subject matter of the hearing already has been determined in a manner adverse to the applicant, (3) that the requested relief is totally contrary to the established policies of the Commission, or (4) that the applicant lacks a sufficiently substantial interest to justify a hearing.¹⁶

The Railroad Commission may exercise broad discretion in disposing of applications submitted to it. It has been held that in its discretion the Commission, even in the absence of changed conditions, may entertain an application identical to one previously denied.¹⁷ But it also has been held that the Commission is not required to hold a fourth hearing on an application to amend a proration formula

¹⁵ 126 Tex. 296, 312, 83 S.W.2d 935, 944 (1935).

¹⁶ Generally, an operator must have a producing well in the reservoir before he has sufficient standing to call a hearing. Mere ownership of undrilled acreage, or even the ownership of an undrilled permit, has been considered insufficient. But in some instances a hearing may be called on the application of royalty owners having an interest in producing wells, particularly if their interests may conflict with those of the lessees. If doubt exists as to whether a hearing should be called, the staff usually will refer the matter to the Commissioners for decision.

¹⁷ *Magnolia Petroleum Co. v. New Process Prod. Co.*, 129 Tex. 617, 104 S.W.2d 1106 (1937); *Magnolia Petroleum Co. v. Railroad Comm'n*, 128 Tex. 189, 96 S.W.2d 273 (1936).

which it has affirmed on three other occasions.¹⁸ However, the Commission's refusal to act does not preclude the availability of judicial relief. The Commission's refusal to require a hearing has been held to constitute sufficient grounds for shutting in a producing well until a hearing is held¹⁹ or for enjoining the drilling of a new well.²⁰

IV. NOTICE OF HEARING

The procedural requirements of notice and hearing that must be satisfied in the administrative determination of most oil and gas matters appear in article 6036a,²¹ which provides as follows:

No rule, regulation or order shall be adopted by the Commission . . . dealing with the conservation of oil and gas and the prevention of the waste thereof, except after hearing upon at least ten . . . days notice given in the manner and form prescribed by the Commission; provided that in case an emergency is found by the Commission to exist which, in its judgment requires the making of a rule, regulation, or order without notice and hearing, such emergency rule, regulation or order may be promulgated and shall have the same validity as if a hearing with respect to the same had been held after due notice. The emergency rule, regulation or order authorized herein shall remain in force no longer than fifteen . . . days from its effective date, and, in any event, it shall expire when the rule, regulation or order made after due notice and hearing with respect to the subject matter of such emergency rule, regulation or order becomes effective.

The Commission may, without prior notice, revoke any rule, regulation or order promulgated by it; and it may, without prior notice, amend the same, provided the subject matter of the amendment was considered at the hearing made the basis for such rule, regulation or order. The renewal or extension of any rule, regulation or order shall be based upon a hearing after proper notice, subject to the provisions of this Section with reference to emergency rules, regulations or orders.

Article 6036a does not specify the manner of serving notices or to whom notices shall be given. It only contemplates that the Commission will prescribe the "manner and form" of the notice. The

¹⁸ *Pan Am. Petroleum Corp. v. Railroad Comm'n*, 335 S.W.2d 425 (Tex. Civ. App. 1960) *error ref. n.r.e.*

¹⁹ *Railroad Comm'n v. Phillips*, 364 S.W.2d 408 (Tex. Civ. App. 1963).

²⁰ *Rabbit Creek Oil Co. v. Shell Petroleum Corp.*, 66 S.W.2d 737 (Tex. Civ. App. 1933).

²¹ Tex. Rev. Civ. Stat. Ann. art. 6036a (1962). Other provisions for notice and hearing in oil and gas matters are Tex. Rev. Civ. Stat. Ann. arts. 6038 (1962) (relating to certain pipeline matters) and 6008b (1962) (requiring notice of hearing on applications for approval of voluntary unitization agreements).

However, in certain proceedings to determine whether its rules, regulations, or orders have been violated, the Railroad Commission is not required to give notice. For example, Commission Rule 54 does not require notice or hearing before the Commission can authorize a directional survey. See *L & G Oil Co. v. Railroad Comm'n*, — Tex. —, 368 S.W.2d 187 (1963), in which Justices Greenhill and Griffin dissented. *Id.* at 197.

Commission's general rule on notices, however, does not do so. This general rule simply provides, "Notices of hearing shall be in accordance with article 6036a. . . ."²²

A. Notices Generally

For the purpose of giving hearing notices, the Commission maintains a basic list of operators²³ for every field in the State. This list is compiled from the basic proration schedule. As a matter of practice, the Commission will honor the request of any other interested person to be placed on the list for a particular field. Except in hearings on Rule 37 matters and voluntary unitization agreements,²⁴ the practice of the Commission in oil and gas hearings is to notify by first-class mail each person whose name appears on this list for the particular field or fields which are the subject of a hearing.²⁵

Notices of hearings are received by no persons whose names do not appear on the Commission list. Royalty owners, working-interest owners not designated as operators, lessees who have no completed well, and owners of unleased land are not given notice unless at their request they are placed on the operators' list. The practical problem of disseminating adequate notice of hearings to persons not on the operators' list is lessened somewhat by the wide circulation of the *Texas Oil Report* and the *State House Reporter*,²⁶ both of which are daily newspapers devoted exclusively to Texas oil and gas matters. Also a number of daily Texas newspapers provide notice of major hearings. In addition, copies of hearing notices are available for inspection at the Commission's district offices.²⁷

The requirements pertaining to substantive content of the notice of hearing are not entirely clear. However, the notice need not set forth all possible action that the Commission may consider or adopt

²² General Procedural Rule 1; see text immediately following note 2 *supra*.

²³ If there are several lessees owning interests in a lease, one usually will be designated as the operator and will deal with the Commission in that capacity. In a few instances, however, a person or corporation owning no working interest may be designated as the operator.

²⁴ Although the Commission has adopted no written rule concerning notices of hearing on voluntary unitization applications under Tex. Rev. Civ. Stat. Ann. art. 6008(b) (1962), its practice has been to require the applicant to submit a full list of the names and addresses of all owners of working interests, royalty interests, oil payments, and of other mineral interests inside the unit area. If any such parties cannot be located, the Commission will require proof that a diligent effort has been made to obtain their correct addresses. Notice to operators in the field but outside the unit is given; however, royalty owners outside the unit usually are not notified of the hearing.

²⁵ If the hearing involves several fields, all operators in each of the fields will receive notice.

²⁶ These newspapers publish rather complete notice of all scheduled hearings.

²⁷ In addition, hearing notices are readily available to the wire services and the Capital press.

if the hearing is called for the purposes stated in the notice and if the action subsequently taken by the Commission is designed to effectuate such stated purposes.²⁸

B. Notice In Rule 37 Cases

As a part of Rule 37, the statewide spacing rule, the Commission has prescribed that, "Such exception shall be granted only after at least ten days notice to all *adjacent lessees* affected thereby has been given and after public hearing at which all interested parties may appear and be heard. . . ." (Emphasis added.) In some instances the Commission staff has construed "adjacent lessees" to mean only those persons owning contiguous leases. On other occasions, persons owning leases within the minimum prescribed distance from the proposed location have been included within the meaning of that term, even if such leases actually are not contiguous to the applicant's lease. Generally, the term "adjacent lessees" has been construed to mean the operator of each adjacent tract, or if there is no operator then at least one lessee or mineral owner thereof. It has been held that a royalty owner is not entitled to notice since presumably he is represented adequately by his own lessee.²⁹ But unless notice is given to adjacent lessees, the Commission lacks jurisdiction to enter a well spacing exception permit order.³⁰

C. Prehearing Procedures

1. *Appearance of Witnesses and Production of Evidence* The Commission and the examiners have statutory authority to compel the appearance of witnesses and the production of all pertinent documents.³¹ The statutes, however, do not mention specifically the issuance of a subpoena or of a subpoena duces tecum. In oil and gas hearings subpoenas are used only occasionally. The Commission uses no standard subpoena form, and if a subpoena is issued the Commission generally will rely on the attorney requesting such subpoena

²⁸ *L. & G Oil Co. v. Railroad Comm'n*, — Tex. —, 368 S.W.2d 187 (1963).

²⁹ *Shell Petroleum Corp. v. Railroad Comm'n*, 137 S.W.2d 797 (Tex. Civ. App. 1949).

³⁰ *Magnolia Petroleum Co. v. Railroad Comm'n*, 128 Tex. 189, 96 S.W.2d 273 (1936).

³¹ Tex. Rev. Civ. Stat. Ann. art. 6471 (1926) specifically authorizes the issuance of subpoenas in any examination or investigation provided for in Title 112 (Railroads), and also authorizes the Commission to issue an attachment for a witness who fails to obey a subpoena. This statute also authorizes the Commission to fine and to imprison a witness for contempt. Under this statute a claim of self-incrimination will not excuse a witness from testifying, but such evidence or testimony cannot be used against him in any criminal proceeding. Tex. Rev. Civ. Stat. Ann. art. 6024 (1962), relative to oil and gas, authorizes the issuances of writs and process; art. 6025 (1962) provides attachment, and art. 6026 (1962) provides immunity from prosecution in case of self-incrimination. It should be noted that authority of an administrative board to fine and to imprison was condemned in *ICC v. Brimson*, 154 U.S. 447 (1893); see also *Langenberg v. Decker*, 132 Ind. 600, 31 N.E. 190 (1892).

to prepare it. The subpoenas are issued under the seal of the Commission and are signed by its secretary.

2. *Depositions* Although authorized by statute,³² prehearing depositions are taken only sporadically; they seldom are used as a discovery device. If taken, depositions in oil and gas hearings generally are used in three situations. First, if a friendly witness is willing to testify about an essential controverted fact but can attend the hearing only with great inconvenience, his deposition may be taken. Second, it may be necessary to take depositions (or to issue subpoenas) in order to obtain essential information from service companies which make pressure tests, electrical or radioactive logs, core analyses, or directional surveys if they refuse to release data or information voluntarily. Third, depositions (and/or subpoenas) must be used for hostile witnesses who will not appear voluntarily.

V. THE HEARING

A special hearing is conducted by an examiner;³³ the Commissioners rarely are present. In addition to the examiner, an official reporter is present during the hearing. A general atmosphere of informality prevails.³⁴ Hearings are held daily, Monday through Friday.³⁵ Normally, the Commission sets three to five hearings for a morning session and an equal number for the afternoon. However, a single hearing frequently requires a longer period.³⁶ Ordinarily, one examiner will conduct all of the hearings scheduled for a particular session. Usually a single examiner will preside at two to four sessions during which he will hear eight to twenty cases per week. Thus, perhaps the most outstanding characteristic of Railroad Commission hearings is the rapidity and efficiency with which they are dispatched.

At the beginning of each session, the examiner calls the docket; *i.e.*, he announces the hearings to be conducted during that session

³² Tex. Rev. Civ. Stat. Ann. art. 6472(a) (Supp. 1963), providing for depositions of witnesses, authorizes the Commission to issue commissions and all other process necessary for taking such depositions; it also requires such depositions to be taken in accordance with the statute governing the taking of depositions in civil cases, so far as that statute is applicable. See Tex. R. Civ. P. 186-215.

³³ Occasionally, the length or the complexity of a vigorously contested hearing will necessitate the use of additional examiners.

³⁴ There is no bench for the examiner, no separate tables for opposing counsel, no special witness chair, and no bailiff to maintain order. The examiner, official reporter, and representatives of the *State House Reporter* and the *Texas Oil Report* usually sit at the same large table along with witnesses and counsel for the parties.

³⁵ Until recently hearings (other than for spacing exceptions) were not held on Monday, which was reserved for the Commissioners and examiners to meet in conference.

³⁶ Rarely will a hearing require more than one week; however, a few hearings have continued for as long as thirty days.

and the order in which they will be held.³⁷ Generally, the examiners proceed in the following sequence: (1) uncontested hearings, (2) hearings which are anticipated to be lightly contested, and (3) hearings which are anticipated either to be vigorously contested or to require considerable time. In most instances the Commission will postpone a hearing in order to accommodate a witness or an attorney who is involved in more than one hearing scheduled for the same day.³⁸

At the outset of the hearing, the examiner requests the names, addresses, and representations of persons making "appearances."³⁹ This information is reflected in the transcript of the hearing. Each person appearing also is advised of the Commission's action in the matter. No rule establishes qualifications or restrictions on persons who practice before the Commission. Moreover, the Commission has no system for licensing or examining its practitioners. It is common for producers and royalty owners to represent themselves or to be represented by engineers, geologists, landmen, lawyers, or ordinary laymen. It has been held that representation before the Railroad Commission's Oil and Gas Division does not constitute the practice of law as that term was defined in the Penal Code.⁴⁰

Although oil and gas hearings are public,⁴¹ the usual participants have a definite interest in the subject matter. However, observers sometimes attend hearings for the purpose of obtaining first-hand information about the oil or gas reservoir in question. On occasion, during the course of the hearing, an observer will request permission to interrogate a witness, to offer evidence, or to make a statement. No rule governs such a situation, but generally the observer is permitted to make an appearance upon identifying himself and stating the nature of his interest in the matter. Occasionally, a disinterested

³⁷ This procedure differs from the usual practice in both trial and appellate courts, where a litigant's docket position usually is determined and knowledge thereof made available prior to the actual calling of the case.

³⁸ The necessity for a postponement for this reason may arise when a Rule 37 hearing and a field hearing are scheduled simultaneously, or when two controversial hearings are held on the same or succeeding days and one is not completed before the other is scheduled to begin.

³⁹ This information is obtained either orally or through the use of appearance slips. Tex. Pen. Code Ann. art. 183-2 (Supp. 1963) requires registration of persons compensated for appearing before a state agency or for contacting an officer or employee of a state agency to influence action on any matter before such agency; failure to register is punishable by fine or imprisonment or both. But a person is not required to register if his contact with the state agency only consists of participating in a public hearing at which he entered his appearance.

⁴⁰ Former art. 430a, Tex. Pen. Code Ann. (1938), *Carr v. Stringer*, 171 S.W.2d 920 (Tex. Civ. App. 1943) *error ref. w.o.m.*

⁴¹ Most Railroad Commission oil and gas hearings are held in one of three hearing rooms in the Tribune Building in Austin.

person is permitted to make a statement on behalf of himself as a member of the public.

A. *The Oath And The Rule On Exclusion Of Witnesses*

As previously stated, the Commission requires testimony to be given under oath.⁴² This rule is rigidly enforced. At the beginning of a hearing the examiner ordinarily requires that all persons be sworn who will give testimony.⁴³ The oath is taken only by those persons who expect to testify and not by all persons who make appearances. Of course, it is unnecessary to take the oath before cross-examining or before making a statement of position.⁴⁴ No written rule applies, but the process of "invoking the rule," by which a witness is prevented from hearing the prior testimony of other witnesses, is not used in Commission oil and gas hearings.⁴⁵ The practice of allowing all witnesses to remain in the hearing room is in keeping with the informality of these hearings.

B. *Procedural Patterns In Uncontested Hearings*

1. *In General* Since no written rule governs the manner of proceeding after a hearing has begun, an almost infinite variety of procedural patterns have evolved. Frequently, in uncontested cases, the applicant's entire case may be presented by a single individual. In these instances the presentation is usually in narrative form and interspersed with exhibits such as electrical logs, core analyses, well

⁴² Commission Rule 3; see text immediately following note 2 *supra*.

⁴³ With the examiner administering the oath, the witnesses then swear en masse, unlike the usual court procedure under which witnesses swear individually when called. En masse swearing has some practical significance because each side thereby gains advance knowledge of the witnesses to be called by the other side. Of course, one party is not required to use all the witnesses he has called, and furthermore a witness could be sworn after the en masse swearing if a decision were made to use him.

⁴⁴ At times the rule regarding sworn testimony has been interpreted so broadly that lawyers or engineers have been required to take the oath in uncontested cases in which the sole evidence presented consisted of schedules and material already on file with the Commission.

⁴⁵ Tex. R. Civ. P. 267 is sometimes used in a statutory suit to test the validity of a Railroad Commission order; it provides as follows:

At the request of either party, in a civil case, the witnesses on both sides may be sworn and removed out of the court room to some place where they can not hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule. Neither party to the suit shall be placed under the rule. Where a corporation is a party to the suit, the court may exempt from the rule an officer or other representative of such corporation to aid counsel in the presentation of the case. If any party be absent the court in its discretion may exempt from the rule a representative of such party. Witnesses, when placed under the rule, shall be instructed by the court that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. Any person violating such instructions may be punished for contempt of court.

performance tabulations and graphs, tabulations of production statistics, and surface and subsurface maps. To improve his case, an applicant may present waivers of objection from some or all of the operators in the field and in some instances from royalty owners.⁴⁶ Particularly in the uncontested case, it is unnecessary for a witness to be qualified as an expert on the subject about which he testifies. No Commission rule requires opinion testimony in an uncontested case to be disregarded merely because a legal predicate has not been laid for the testimony of a witness. Also, it is common for a witness in an uncontested case to express opinions based on a map which was prepared neither by him nor under his direction or supervision.

2. *Hearsay Evidence* In some uncontested cases, witnesses have been permitted to discuss the existence or nonexistence of faults or other geologic features based upon conversations or correspondence with a geologist without even presenting the electric logs or other data upon which the geology was determined. In such cases there is no one except the examiner to object to the evidence, and there are no rules which govern. Therefore, the individual examiner's opinion of the reliability and propriety of the evidence is of crucial significance. If the examiner concludes that the evidence presented by the witness lacks reliability or is too remote from the actual knowledge of the witness, he may follow either of two courses: (1) he may say nothing to the witness, but report the facts to the Commission and recommend denial of the application; or (2) he may request the applicant's witness to provide the Commission with necessary primary evidence to support the presentation. If the examiner believes the case probably is without merit, he justifiably may require the applicant to present satisfactory evidence on each element of the case. Similarly, if the examiner believes that the case may have merit but that the applicant has not adequately presented matters therein, he may suggest that the applicant obtain and present additional evidence.

In an uncontested hearing the examiner (or the Commission) does not act as an adversary but rather as a guardian of the public interest. In some cases, however, the examiner also assumes the position of a guardian of unrepresented private interests.⁴⁷ Inasmuch as the examiner is responsible for implementing all policies of the Commission, he may ask questions or request additional evidence in order to be

⁴⁶ These waivers often are in the form of letters or telegrams sent directly to the Commission; they need not be sworn to.

⁴⁷ On his own initiative, the examiner may inquire into the application's effect on owners of royalties or of undeveloped leases who probably have not received notice of hearing.

able to make a full report and recommendation. In order to facilitate the presentation of all relevant evidence, a party in an uncontested hearing usually will be accorded the opportunity to submit additional data after the conclusion of the hearing if he so wishes, regardless of whether the examiner has requested additional evidence.

In many uncontested cases the engineering and geological witnesses are eminently qualified experts and are more familiar than is the examiner with the particular reservoir under consideration. In such a case, the examiner may be satisfied that a *prima facie* case has been presented which justifies the granting of the application. He nevertheless may desire to interrogate the witnesses to make certain that other facts do not exist that might command a contrary result. Under these circumstances an examiner is justified in interrogating experts in an uncontested case, and he probably has the duty to do so.

C. Procedural Patterns In Contested Hearings

Frequently a contested hearing is a multi-party proceeding in which several parties request various orders. In these cases there is no definite procedure for the presentation of evidence or for cross-examination. Generally, however, anyone will be permitted to submit evidence or to state his position.

1. *Direct Examination* Perhaps because attorneys participate more often in contested hearings, the question-and-answer technique, customary in trials, is more common therein than in uncontested hearings. The narrative presentation is faster, but the question-and-answer approach is more flexible and allows the attorney to emphasize particular points favorable to his position. Often all the evidence, including the exhibits and a narrative summary, is set forth in a report or brochure. If a brochure is used, a copy thereof usually will be offered in evidence at the beginning of the hearing. Thereafter, the witnesses, either by question and answer or by narration, will explain the exhibits and state their opinions based thereon. Of course, if a brochure is not used, individual exhibits will be offered in evidence during the testimony of the witnesses.

2. *Exhibits* The Commission receives one copy of the exhibit in evidence⁴⁸ and does not require the preparation and filing of additional copies. Copies of the exhibits are not required by the Commission to be furnished to the protestants at any time before, during, or after the hearing. If there is only a single copy of the exhibits, a party may be deprived of an effective opportunity to study the de-

⁴⁸ In the case of hearings for approval of unitization agreements, however, the Commission requests a second copy of these agreements, for which it maintains a separate file.

tails of the exhibits during the hearing. Because of the speed with which the contested hearings are conducted, it is a substantial advantage to study an opponent's exhibits in advance of the hearing. These exhibits are frequently very complicated maps, lengthy tabulations of field statistics, or complex graphs or cross-sections. Expert witnesses and lawyers usually have seen few, if any, of the opposition's exhibits prior to the hearing. A party who is unaware of the applicant's conclusions and his reasons sustaining them generally cannot cross-examine intelligently and effectively if he is not furnished the exhibits and conclusions until the beginning of the hearing. The chance of effective opposition will be even less if copies are not furnished during the hearing. Of course, the cross-examiner of a technical witness will be afforded a brief opportunity to examine the exhibit prior to his cross-examination, but this is not sufficient time to examine an exhibit prepared by a technical witness and one consisting of several pages of reservoir statistics and conclusions which were unknown and could not have been reasonably anticipated before the hearing. The lawyer representing a protestant or an applicant may be able to persuade the examiner to grant a ten-minute recess; but even this brief period may not suffice if applicant's evidence consists of numerous pages of highly interpretive maps, graphs, and formulas. Fortunate is the cross-examiner who, by delaying his cross-examination, can utilize the noon recess or an evening to study the exhibit.

As a practical matter, however, the parties with increasing frequency are exchanging exhibits at the beginning of the hearing—perhaps out of mutual fear, respect, or courtesy, or from a desire to create a favorable impression with the examiner. Also, generally copies are exchanged when they are offered in evidence. Thus, in some instances the parties encounter no real problem in the timely obtaining of relevant information from their opponents. But it must be noted that the practice of exchanging copies of exhibits and data prior to the hearing in contested matters is far from being widespread.

3. *Cross-Examination* Although not provided for by rule, as a matter of practice the right of cross-examination in oil and gas hearings has been protected studiously by the Commission examiners. Formerly, a witness was tendered for cross-examination immediately after he had testified.⁴⁹ Although this practice still is followed occasionally, in recent years the examiners increasingly have permitted or required an applicant to present his entire case, including all testimony

⁴⁹ Cross-examination of a witness immediately after the conclusion of his testimony is still the practice followed in trial courts.

and all exhibits, prior to any cross-examination. This procedure has several advantages. For example, an applicant initially is permitted to develop his entire case and to emphasize his salient points. A protestant, on the other hand, has more time in which to appraise and to analyze the applicant's testimony, other evidence, and contentions before commencing cross-examination. Since the Railroad Commission does not restrict cross-examination to matters covered on direct examination, under the former practice cross-examination of an initial witness often encompassed facts or admissions which a subsequent witness would disclose more thoroughly and accurately during direct examination. This inefficiency in presentation is avoided if a protestant prior to cross-examination has heard the applicant's entire presentation and is aware of each witness's particular sphere of knowledge.

It is possible for protestants to show material inconsistencies in the testimony by careful cross-examination of applicant's several witnesses. However, this task is difficult because all of the applicant's witnesses are permitted to remain in the hearing room during the entire case. Showing material inconsistencies is made difficult also by the applicant's generally being permitted to present his entire case before any cross-examination.

4. *Adverse Witnesses* In an oil and gas hearing, an operator is not restricted to the use of friendly witnesses. He may, and occasionally does, call another operator or an engineer as an adverse witness. A hostile adverse witness apparently never has been jailed or fined by the Commission for refusal to answer; however, a refusal undoubtedly has an effect upon the eventual decision. On occasion, much care is taken to see that persons whose testimony might be harmful do not attend a hearing in order to prevent their being called as adverse witnesses.

5. *Recalling Witness, Recross, Redirect, and Rebuttal* Witnesses are not required to be excused by the examiner before they permanently leave the hearing. But in contested hearings, counsel customarily obtains permission before releasing a witness, especially if a possibility exists that another party may wish to recall him. There is no limitation upon the number of times a witness can be examined on redirect or recross-examination. In fact, an attorney may examine the same witness on at least several occasions during a simple hearing. An applicant always is granted the opportunity to rebut a protestant's evidence. Neither rule nor custom limits rebuttal to matters presented by a protestant. On the contrary an applicant frequently pre-

sents new arguments, new evidence, and new opinions during rebuttal.

6. *Rulings on Point of Evidence* Although often made in contested hearings, objections to the admissibility of evidence seldom are sustained. As may be expected in the absence of uniform rules, rulings on the admissibility of evidence vary considerably among the individual examiners, but generally they are in favor of admissibility. On the relatively rare occasions on which an examiner excludes evidence, at least three basic courses of action are open to the party who tendered the evidence:

(1) Counsel may accept the ruling and attempt another method of proof. Usually this course is taken because to do otherwise might antagonize the examiner.

(2) Counsel may ask to submit the evidence on a "bill of exception." Although bills of exception also are not covered by definitive standards, nevertheless the examiner may permit the evidence to be included in the record as a bill of exception if the proponent is sufficiently forceful.

(3) Counsel may submit the evidence to the three Commissioners for the final decision.

No rule regulates or prevents the use of any of these alternatives, and all three have been used at times.

Objections to the admissibility of evidence most often are urged on the basis of relevancy, the best evidence rule, hearsay, or lack of a witness's qualifications to express an expert opinion. Examiners generally make a sustained effort to keep the evidence within the scope of the hearing as set out in the notice of hearing. Occasionally, they are sympathetic to an objection that particular evidence is not material or relevant to the matters covered by the hearing notice. Also, some examiners tend to exclude evidence of conditions or results in a reservoir other than the field under consideration on the ground that such evidence would burden the record unduly, even though it is contended that such evidence would form the basis for an opinion on the reservoir in question. If an objection is clearly frivolous or used simply to harass the opposition, the examiners generally will overrule the objection summarily. If the objection is meritorious and is argued strenuously, the examiner may receive the evidence but call the objection to the attention of the Commission.

A party whose objection has been overruled does not have any well-defined remedy. He may not obtain a new hearing because of improperly admitted testimony. He has no significant opportunity to obtain a reversal of the decision because of the receipt of inadmis-

sible testimony. Even if the examiner notes the objection and calls it to the attention of the Commission, the parties never will be advised what ruling, if any, the Commission may have made on the objected point. A similar result will follow if evidence is submitted on a "bill of exception." Under these circumstances, it may appear that objections to testimony or exhibits are futile—some members of the Commission staff view them in this way. However, the making of objections may serve at least two useful purposes. First, objections may point up to the examiner the unreliability of the particular evidence offered. For example, an objection on the ground of hearsay, though overruled, nevertheless may influence the examiner if there is no apparent reason for not using other evidence.⁵⁰ Second, objections by a party tend to cause his opponents to exercise greater care in presenting evidence before the Commission.

Although the Commission protects the right to cross-examine, affidavits containing statements of fact and opinions will be accepted in evidence.⁵¹ An objection to the admission of an affidavit on the ground of deprivation of the right to cross-examination probably will be overruled. But such practice also may raise a substantial question with the examiner as to why the affidavit was used instead of the testimony of the witness himself.

In general, objections during cross-examination probably are sustained more often than those made during direct examination. Frequent grounds for successful objections to questions on cross-examination are (1) that the question is argumentative, (2) that the question is not relevant to the hearing, (3) that the question is repetitious, and (4) that the witness is not qualified to answer the question. Objection to a witness's lack of qualification was successful even under the following circumstances. On direct examination applicant's witness, a qualified petroleum engineer, testified that an allocation formula would give all operators in the field, including protestant, an opportunity to recover their fair share of hydrocarbons from the reservoir. On cross-examination protestant's lawyer asked the witness what he meant by "fair share." Applicant's attorney objected to the question on the ground that the question called for expert opinion on a legal matter and that the witness was not quali-

⁵⁰ Also, for example, an objection to testimony regarding a core analysis may be overruled on the ground of the "best evidence" rule. However, it may raise the question in the examiner's mind as to why the report of the core analysis itself was not submitted in evidence.

⁵¹ However, use of an affidavit instead of calling the witness to testify in person does not mean necessarily that the same weight will attach to the affidavit as would have been accorded to actual testimony.

fied as a lawyer. The objection was sustained. But in another case applicant's engineer attempted to testify that a particular formula would give each operator his fair share. Protestant objected on the ground that applicant's engineer was not qualified as a lawyer. Nevertheless, the witness was permitted to explain what he meant by the term "fair share."

Objections during cross-examination may protect friendly witnesses from harassment⁵² and also may provide a witness with a safe answer. Such education or assistance to a witness will be unnecessary if he is alert and is familiar with all phases of the case. Frequently, however, a witness does not perceive the cross-examiner's immediate objective in propounding particular questions and as a result may give damaging responses thereto. If at this point a party's lawyer sees a possible trap for his witness looming ahead, he can protect his witness by objecting to the question on the ground of ambiguity or of susceptibility to several answers and by then sufficiently explaining his objection so that his witness will be alerted to the trap and will testify accordingly.

7. Confidential Information The oil and gas industry long has been both competitive and secretive. These characteristics of the industry create some special problems for the Commission in its adjudicatory and rule-making capacities. It apparently is conceded generally that documents and other records filed with the Commission are public records, which any member of the public may examine as a matter of right.⁵³ Also, the Commission clearly has the statutory power to require witnesses to appear, to answer questions, and to submit data and records that are relevant to some inquiry within the Commission's broad scope of authority. But frequently confidential infor-

⁵² Objections during cross examination are a common procedure known as "protecting the witness." Some engineers and geologists experienced in oil and gas regulatory matters have little regard for the function of a lawyer therein to analyze and to evaluate the evidence, to examine witnesses, to argue a case, and to write briefs. Some of these lay proration experts believe that in a hearing a lawyer's sole function is to protect his own witnesses from harassment and to impeach the testimony of opposing witnesses.

⁵³ Tex. Rev. Civ. Stat. Ann. arts. 6029 (3), (7) (1962) and 6049(c), § 5 (1962) authorize the promulgation of rules and regulations by the Railroad Commission prescribing the keeping of records of wells drilled and of other information necessary for the Commission's administration of the conservation statutes. The long established practice of the Commission has been to allow public inspection of all data and records filed with it by operators. No statute has been found which specifically makes such records available to the public; however, the public record concept is supported by Ops. Att'y Gen. No. 0-854 (1939). But an examiner's report to the Commission summarizing a public hearing (other than a Rule 37 hearing) always is treated as confidential and is available only to Commission personnel. Also Statewide Rule 2 accords an official and confidential character to certain information obtained by the Commission. From this rule, it would appear that the Commission distinguishes between information obtained through its inspections of wells and well records and data filed by operators with the Commission.

mation is highly relevant—perhaps crucial—to hearings and decisions on matters within the Commission's authority. In general, the Commission has resolved the dilemma by not insisting upon the submission of data, logs, or other information which an operator does not desire to disclose. Although the Commission has announced no official policy in regard thereto, it seems reasonably clear from a study of individual decisions that an operator's failure to submit important available data is definitely a significant factor in the final decision. Consequently, if an operator elects to withhold data in order to maintain their confidential character, he can be confident that the Commission in reaching its decision will assume that the withheld data do not support his contentions.⁵⁴

8. *Closing Statements* Consistent with judicial procedure, the applicant has the privilege of making the last oral summation or statement of position.⁵⁵ In order to economize the use of time, each party is allowed only one closing statement. Oral closing statements are the normal manner in which a hearing is concluded, but there are other alternatives. The parties may agree to waive closing statements and to submit the case on the record. More often, however, the parties will request permission to submit briefs or written closing statements; such permission usually is granted. An examiner on his own motion may request written briefs, but seldom does so. If a request is made to file written briefs, the examiner generally will require all briefs to be submitted on a predetermined date. But in a few cases in which novel legal questions were raised, examiners have permitted briefs to be filed serially; *i.e.*, first, a brief from applicant, then an answer from protestant, followed by applicant's reply.

The time that will be allowed for filing briefs is entirely within the examiner's discretion and usually ranges from one week to one month. In some instances, the filing date for briefs is computed from the time at which the reporter completes and dates the transcript.⁵⁶ In other instances, in which a transcript would not be important to the preparation of a closing statement, the filing date may be set with

⁵⁴ But there are some exceptions, such as in the administrative handling (*i.e.*, without public hearing) of completions, discovery allowables, and reservoir classifications. In some of these cases, operators have been permitted to display their logs to the Commission personnel without filing them, thereby convincing the Commission on a point without making their secret logs a part of the public record. This practice has been discontinued largely.

⁵⁵ Unlike in judicial procedure, however, an applicant ordinarily is not accorded an opportunity to make an opening statement.

⁵⁶ The transcript prepared by the reporter is actually the transcribed oral testimony and other oral statements made during the hearing; it does not include the exhibits or the hearing notice or application. The transcript for an oil and gas hearing more nearly corresponds to the statement of facts in appellate practice.

reference to the conclusion of the hearing.⁵⁷ If permission to file briefs or written closing statements is granted, the examiner sometimes will announce that copies of the briefs or closing statements shall be furnished to all other parties. There is no written rule requiring the furnishing of copies, and all too often copies are not furnished voluntarily. In some instances closing statements are filed and received by the Commission even when express permission of the examiner to file statements or briefs was not requested.

D. *The Decision*

1. *Examiner's Memorandum* After the hearing has been closed, the examiner prepares a narrative summary of the facts and the issues. This memorandum states the contentions of the parties and contains the examiner's views on the hearing, including his recommendations concerning the order to be entered by the Commission.⁵⁸ But the memorandum does not contain findings of fact or conclusions of law as those terms usually are understood. After a memorandum has been prepared, it is submitted with the file to the Chief Engineer who after reviewing it indicates his approval or disapproval of the examiner's recommendation. At this point the examiner may explain or discuss the memorandum with the Chief Engineer. The file and memorandum then are returned to the examiner who thereafter presents the case to the Commission for its decision. At no time is a memorandum submitted to interested parties for their exceptions or objections. A memorandum never is made public. Secrecy of the memorandum is not required by any rule, but secrecy is maintained in accordance with one of the most well-established customs of Commission practice.⁵⁹

2. *Evidence Outside the Record* Some examiners adhere strictly to the record in preparing the memorandum. Often, however, examiners

⁵⁷ In lengthy and vigorously contested hearings, often the transcript will not be available until one to two months after the completion of the hearing.

Frequently, there is much maneuvering among counsel relative to the filing of briefs or written statements and the time therefor. If a party is suffering a continuous injury (e.g., drainage) but believes the obtaining of a favorable order from the Commission is likely, he usually will oppose the filing of written statements or of briefs especially because of the possible delay which such action could cause in the rendition of the final order. If briefs or statements are allowed over his objection, such a party usually will insist upon the earliest possible filing date for briefs or written statements. Of course, a party seeking delay usually will argue that a brief based upon the contents of the transcript is much more reliable than an oral or written statement presented from memory.

⁵⁸ The Commission has issued no written instructions on the preparation of a memorandum. An examiner has considerable discretion therein and usually adopts the procedures of his predecessors and contemporaries.

⁵⁹ In the past a memorandum was placed with the remainder of the record after a case was decided, and thus it became a part of the public record. But now memoranda are maintained in a confidential separate file.

make lengthy investigations into the Commission's proration files and other records to corroborate or to contradict facts in the record.⁶⁰ In some instances examiners correspond with personnel in the field offices of the Commission to verify or to obtain additional facts. Examiners frequently compare maps submitted to the Commission in other hearings with those offered by witnesses. In complex cases the examiner may consult with staff engineers or geologists. Current oil and gas periodicals, textbooks, and other source materials frequently are consulted. Customarily, an examiner refers to these extra-record sources of information in his memorandum. But since the memorandum never is submitted to the parties, they ordinarily are not able to determine whether an examiner has consulted extra-record sources or not; and if he has, they are unaware of the influence, if any, such sources may have had on the decision. Thus, no opportunity exists to refute or to rebut such extra-record sources. There are no Commission rules governing any of these matters except general procedural Rule 5, which places the public on notice that the Commission may take official administrative notice of its own records and files.⁶¹

In August, 1964, the Commission issued a written memorandum to its examiners providing as follows: "All Commission employees responsible for the hearing, processing and presentation of an application to the Commission shall not discuss the pending application, after hearing and prior to Commission determination, with any interested party unless in the presence of a majority of the Commission." Prior to the issuance of this directive it was not uncommon for an examiner to request or to receive additional data or evidence from a witness after conclusion of the hearing and before submission of the case to the Commission for its decision. If this occurred, opposing parties might or might not be advised of the additional evidence or arguments which were submitted subsequent to the conclusion of the hearing.

At any stage of the administrative determination, the litigants may communicate with the Commissioners and may submit data, opinions, or arguments to them. Such practices do not occur with regularity. However, if a party does communicate with the Commissioners or submit additional evidence to them, an opportunity to be heard in regard thereto is not required to be given to the other parties to the same hearing. In rare instances the Commissioners have given all

⁶⁰ Generally, the Commission files are considered part of the record in every hearing.

⁶¹ See text immediately following note 2 *supra*.

parties an opportunity to confer with them or to submit data in an informal conference after the hearing but prior to the decision.

3. *The Conference* An examiner's presentation to the Commission is made at a formal conference.⁶² The Texas Supreme Court has held that the decisions of the Railroad Commission must be made at a duly scheduled meeting of which all three Commissioners have notice and that orders made by the individual and separate action of two Commissioners are not valid.⁶³ Generally, a conference is held on Monday of each week; however, this schedule is not followed rigidly. Only the Commissioners, the Chief Engineer, and the examiners presenting cases on that day usually are present at the formal conference. Litigants and their representatives are not accorded a formal opportunity to be apprised of the evidence and the contentions which actually were presented to or considered by the Commissioners in reaching their decision. The amount of time spent in conference considering each case naturally will vary according to the novelty and complexity of the evidence and issues presented. The speed with which these "decision conferences" move is indicated by the fact that the Commission, in addition to performing its many other duties, renders sixty to eighty decisions per week in oil and gas hearings.⁶⁴

A court of civil appeals has held that a person is not required to hear a case in order to render a decision therein.⁶⁵ No case has held that there is a legal necessity for the Commissioners to read the record, to study the exhibits, or to discuss the case with the examiner. The only requirement is the existence of an opportunity for the Commissioners to discuss the case with the person who heard the evidence and who conducted the hearing.⁶⁶ In reaching its decision, the Commission is not bound by the recommendation of an examiner⁶⁷ or of the Chief Engineer.⁶⁸ A majority vote of the three Commissioners is necessary for a decision. After a case is decided, the

⁶² Prior to conference, the full transcript of the proceedings in all contested cases and in any uncontroverted case raising a question of first impression is made available to the Commissioners.

⁶³ *Webster v. Texas & Pac. Motor Transp. Co.*, 140 Tex. 131, 166 S.W.2d 75 (1942); *accord*, *Sanders v. Midstates Oil Corp.*, 166 S.W.2d 716 (Tex. Civ. App. 1942).

⁶⁴ The Commission must allocate some time to its Gas Utility Division and to its Liquefied Petroleum Gas Division; in addition, it must decide an average of fifty hearings per week in its Motor Transportation and Railroad Rate Divisions. Also it must decide many matters with respect to which hearings have not been held. It may be speculated that an average of about four hours per week is spent in the process of deciding both contested and uncontested oil and gas hearings.

⁶⁵ *Magnolia Petroleum Co. v. Railroad Comm'n*, 127 S.W.2d 230 (Tex. Civ. App. 1939) *error dismissed, judgment corrected*.

⁶⁶ *Ibid.*

⁶⁷ *Empire Gas & Fuel Co. v. Railroad Comm'n*, 94 S.W.2d 1240 (Tex. Civ. App. 1936) *error ref.*

⁶⁸ *Railroad Comm'n v. Irwin*, 265 S.W.2d 234 (Tex. Civ. App. 1954) *error ref. n.r.e.*

Commissioners will initial the memorandum and indicate their decision. The Commissioners do not make express findings of fact or conclusions of law at the conference and generally do not state reasons in support of their decision.

4. *Advising the Parties of the Decision* After the conference, the examiner who held the hearing advises the litigants of the decision by letter. Copies of the letter will be mailed to all persons who made appearances at the hearing. The letter of notification does not indicate which issues were presented to the Commission, which issues the Commission considered controlling, or which evidence was actually discussed; nor does the letter mention what findings the Commission made on the evidence, what the reasons were for the denial, whether other evidence might have resulted in a different decision, or whether the vote was unanimous or by a majority. The letter does not even advise the recipient of the number of Commissioners present at the formal conference. By questioning the staff or Commissioners, however, the parties may obtain unofficial answers to some of these questions.

If an application is denied, generally the Commission will enter no formal order, and normally no opinion will be written explaining the denial.⁶⁹ The letter of denial closes the case. If an application for rules is granted, the examiner's letter, in addition to advising of the action taken, will contain in summary form the rules granted, their effective date, and notice of a forthcoming formal order. Unlike the letter of denial, copies of this letter normally are sent to all operators in the field regardless of whether or not they were represented at the hearing. This letter does not contain findings, conclusions, or reasons in support of the Commission's action. No written rule covers the matter, but the Commission usually considers its action to be effective as of the date of the conference at which a decision is rendered, unless some later date is specified at that time. In any event the letter written by the examiner is treated by the Commission as binding on all persons from the date it is written.

5. *Formal Orders* The formal order ordinarily is issued from one to ten weeks after the conference; the length of the time depends primarily on the complexity of the action and on the work load of the examiner who prepares it. As mentioned previously, formal orders are not issued in cases in which an application is denied; also, formal

⁶⁹ On extremely rare occasions, the Commissioners have written opinions. Usually written in cases in which an important matter was decided by a split vote, these opinions are made public and enlighten the litigants and the public on the policies behind and the factual bases for the decisions.

orders are not issued in cases involving changes of allowables or in some matters affecting the operation of individual wells. In these situations, formal orders are omitted even though the applications may have been protested and even though the Commission's action may substantially affect the property and correlative rights of royalty owners and operators.

The formal order is truly formal in its structure. It is dated, contains "whereas" clauses and an "ordered" clause, is signed by all Commissioners who voted for the order, and is attested, sealed, and signed by the Secretary of the Commission. If a Commissioner dissented from an order, the dissent is not noted as such, but the dissenter's signature is not placed thereon.

In some instances the "whereas" clauses in Commission orders are actually fact findings on material, controverted issues. In these cases the litigants are given some insight into the Commission's decision and the reasons therefor. Much more often, however, the "whereas" clauses actually consist of mere recitations of undisputed evidentiary facts. In addition, "whereas" clauses typically state the date of reservoir discovery, the average permeability, the average porosity, and the original pressure. A "whereas" clause in a field rule formal order usually recites that the rules hereinafter adopted are necessary to prevent waste as defined in the applicable statutes.⁷⁰ This recitation could be considered a finding, but the litigants and the general public are not apprised of the actual waste which was occurring or in what manner a particular order is designed to prevent waste. It is apparent that in many cases the real basis for the orders is the protection of correlative rights. However, the orders seldom contain findings on the need for protecting these rights or explain that the reason for promulgating the order is to prevent drainage. Inadequate specific findings and conclusions and the failure to explain official action frustrate efforts by the litigants to understand why an order was granted in one field and denied in another, why an order was granted to one person but denied to another, or why one type of order was chosen to prevent waste in one field and another type was chosen in another field. The formal orders of the Commission nearly always conclude with the clause, "It is further ordered that this cause be held on the docket for such other and further orders as may be necessary."⁷¹

⁷⁰ In its special field rule orders, the Commission provides that the general rules of the Commission shall remain in effect to the extent not in conflict with the special order.

⁷¹ The effect of this clause has been discussed in *Humble Oil & Ref. Co. v. Railroad Comm'n*, 193 S.W.2d 824 (Tex. Civ. App. 1946) *error ref. n.r.e., cert. denied*, 331 U.S. 791 (1946), and in *Railroad Comm'n v. Shell Oil Co.*, 369 S.W.2d 363 (Tex. Civ. App. 1963), *aff'd*, — Tex. —, 380 S.W.2d 556 (1964). The Rule 37 permits of the Commission do not contain this "open end" provision.

The Commission now has prepared standard printed forms to be used in entering most of its orders; e.g., field rules for an oil or gas field or approval of a gas injection project, of a voluntary unitization agreement,⁷² of a multiple completion application, of a waterflood, or of a salt water disposal well. By using these forms, the examiner preparing the formal order easily may fill in the blanks and thereby is discouraged from setting out the real issues in controversy, reciting findings thereon, or disclosing the precise reasons for entering the order. The use of forms in the preparation of formal orders is a relatively recent development, but even formerly it was not the practice of the Commission to state in the order the reasoning underlying its choice of a particular course of action. For more than ten years, the Commission has used a printed form for almost all Rule 37 permit orders.⁷³ This printed form states simply that after notice and hearing the Commission finds that the permit is necessary to prevent confiscation and/or waste. The same form is used regardless of whether the Commission actually considered either the question of confiscation or of prevention of waste or whether any evidence thereon was heard.⁷⁴ In *Miller v. Railroad Comm'n*,⁷⁵ the use of printed forms containing previously prepared fact findings in cases in which the Commission was required by statute to make findings was criticized as a denial of procedural due process in a concurring opinion by the coauthor, Associate Justice Greenhill.

6. *Motions for Rehearing* Motions for rehearing are governed by the written rule set out previously.⁷⁶ Motions for rehearing actually are filed in only a minority of contested cases and seldom are granted. Generally, such motions are filed with the examiner; however, in some instances copies of the motion are delivered directly to the Commissioners. Ordinarily, motions for rehearing are presented by an examiner to the Commissioners at a formal conference. Usually, a new memorandum is not prepared by the examiner, but he orally recommends the disposition of the motion for rehearing.

If the motion for rehearing is filed by a party in interest in the field affected by the order who contends that he did not receive

⁷² Tex. Rev. Civ. Stat. Ann. art. 6008b (1962).

⁷³ The denial of permits has been sufficiently rare that a printed form is not used therefor.

⁷⁴ This permit form was not in use when the order involved in *Gulf Land Co. v. Atlantic Ref. Co.*, 134 Tex. 59, 131 S.W.2d 73 (1939), was entered.

⁷⁵ — Tex. —, 363 S.W.2d 244, 247 (1962).

⁷⁶ See note 1 *supra*. This order was designed to relate to motions for rehearing on all matters except Rule 37 hearings. Rule 37 permits are governed by another order authorizing the filing of a motion for rehearing within fifteen days of the Railroad Commission's Rule 37 permit order. See Unnumbered Special Order, March 3, 1941, Tex. R.R. Comm'n Rules & Regs. § 1, at 12.

timely notice of the hearing, there is a good possibility that the motion will be granted. In a few cases rehearing has been granted at the instance of royalty owners who alleged that they were given no notice, even though under existing Commission practice normally no notice of a hearing is mailed to royalty owners. The Commission's published rule on motions for rehearing does not mention the necessity for reciting the existence of new evidence. By custom, however, it is most difficult to obtain a rehearing unless the motion recites some evidence which was not submitted at the original hearing and—preferably—which could not have been produced at the original hearing with the exercise of diligence.

The rule requires that the motion for rehearing be filed within fifteen days from the "promulgation or adoption" of the order.⁷⁷ Although the date of the conference at which a decision is made usually is considered for most purposes to be the effective date of Commission action, nevertheless there is a question whether the fifteen-day period runs from the date of the formal conference at which the matter is decided, from the date of the examiner's letter advising of the action taken, or from the date of the formal order (if one is entered). As to Rule 37⁷⁸ exception permits, however, the practice is to consider the period as commencing with the date of the formal order because in Rule 37 matters examiners' letters do not precede formal orders. Unless waivers of objection from all adjacent lessees have been filed, a Rule 37 permit is not effective until fifteen days after it is entered. The filing of a motion for rehearing suspends the effective date of the permit either until the Commission denies the motion for rehearing or, if the motion is granted, until the effectiveness of the original permit is redetermined on rehearing. In oil and gas hearings other than Rule 37 matters, the filing of a motion for rehearing does not suspend the order automatically until the motion has been disposed of. The Commission usually grants a rehearing without suspending the effectiveness of its original order, but it may, as an incident to granting a rehearing, suspend its original order until the rehearing is held.

It has been held that the filing of a motion for rehearing is not a prerequisite to commencing a suit to test the validity of a Com-

⁷⁷ *Ibid.*

⁷⁸ Rule 37 is the statewide spacing rule governing the location for drilling wells; the location is expressed in terms of distance to lease lines, property lines, unit lines, and farm lines, and in terms of distance between wells on the same lease, property, farm, or unit. Many fields have special field rules different from the statewide Rule 37, but the special field rule spacing and all exceptions to statewide Rule 37 are handled under the procedure for exception permits under Rule 37.

mission order; the administrative remedy is considered to be exhausted without filing a motion for rehearing.⁷⁹

The filing *vel non* of a motion for rehearing in oil and gas matters other than Rule 37 permits may not be greatly significant because ordinarily the Commission does not treat its orders as *res judicata*. For instance, if the Commission were to enter an order adopting eighty-acre units with one hundred per cent acreage allocation for a particular reservoir, this order would not be considered by the Commission as final in every sense of the word. A party objecting to an order may file a motion for rehearing within the permissible fifteen days.⁸⁰ But if he does not do so, he may submit a new application to amend or to rescind the adopted rules; such an application may be filed at any time—not necessarily within the fifteen-day period. The Commission considers that it has discretion to grant or to deny a hearing on the new application. If the new application recites some changed conditions occurring since the date of the original order, a greater likelihood exists that the Commission will conduct a second hearing. But ordinarily the Commission does not consider changed conditions to be essential to the granting of a second hearing.

7. *Oral Argument* In important oil and gas matters litigants occasionally request the Commission to allow oral argument before the Commissioners. These requests are denied more often than not. Approximately four to six such requests are granted annually. During these infrequent oral arguments the Commissioners often direct questions to the parties in a manner similar to that used in civil appellate practice. Of course, if oral arguments are held, the parties can be assured that all evidence and contentions will be considered by the Commission.

VI. CONCLUSION

Primary jurisdiction to prevent waste and protect correlative rights in oil and gas reservoirs has been delegated in Texas to the Railroad Commission. This administrative agency, rather than the courts, has the duty to make thousands of adjudications involving valuable property rights in the state's major industry. Here, as in other areas in which legislative or quasi-judicial functions have been delegated to an administrative agency, advantages are expected in the form of faster decisions and greater uniformity of policy. Delegation of both rule-making and adjudicatory powers to a specialized agency would

⁷⁹ *Trapp v. Atlantic Ref. Co.*, 170 S.W.2d 506 (Tex. Civ. App. 1943) *error ref.*

⁸⁰ See text accompanying note 77 *supra*.

appear to be particularly appropriate in an area in which expert knowledge and experience are essential to sound decisions and in which the number of controversies presented for decision is almost endless.

In order to achieve speed and uniformity, administrative agencies usually depart from some of the traditional practices and procedures familiar to lawyers in court litigation. The Railroad Commission's adjudication of oil and gas controversies is no exception. The process of adjudication from application through final order is vastly different from that which litigants have come to expect in the court room. Certainly some measure of uniformity of decision and of policy has been achieved in Texas oil and gas regulation. Without doubt, thousands of decisions are made with speed and efficiency.⁸¹ It is comparatively rare for more than four months to elapse between application and final order, but it is also somewhat rare to obtain a final judgment from a trial court in a contested case in less than four months.

The authors have attempted to describe the Texas administrative process in oil and gas matters as it exists. The purpose of this article is neither to advocate procedural changes nor to defend all of the present practices and procedures.

⁸¹In 1943, in Davis & Willbern, *Administrative Control of Oil Production in Texas*, 22 Texas L. Rev. 149, the personnel picture of the Commission was described as dismal. The authors are of the opinion that in 1964 capable and energetic expert personnel staff the Railroad Commission.

Southwestern Law Journal

VOLUME 18

September 1964

NUMBER 3

BOARD OF EDITORS

JOHN R. JOHNSON
Editor-in-Chief

JAMES W. BRENNAN
Managing Editor

ROBERT C. GIST
Notes & Developments Editor

WALLACE M. SWANSON
Leading Articles Editor

JOHN M. STEPHENSON
Comments Editor

JOE SCOTT MORRIS
Research Editor

ARTHUR E. HEWETT
Business Manager

BOARD MEMBERS

JAMES WM. CARDWELL
MICHAEL L. GARRETT

R. BRUCE LABOON
REBA GRAHAM RASOR

ADVISORY BOARD

Richard Barber
School of Law
Southern Methodist University

DeForest Billyou
School of Law
New York University

Jack H. Friedenthal
School of Law
Stanford University

Robert L. Gilliat
Office of the General Counsel
Department of Defense

Hon. Jack Pope
Court of Civil Appeals
San Antonio, Texas

Howard J. Taubenfeld
School of Law
Southern Methodist University

Henry Weihofen
School of Law
University of New Mexico

Frank M. Wozencraft
Baker, Botts, Shepherd & Coates
Houston, Texas

Hon. Frederick G. Hamley
United States Court of Appeals
San Francisco, California

ALAN R. BROMBERG
Faculty Advisor

Member, National Conference of Law Reviews